

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Aug 22, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JARED JACKSON,

Plaintiff,

v.

LIVE NATION WORLDWIDE INC, a  
Delaware Corporation; CONSCIOUS  
ENTERTAINMENT GROUP LLC, a  
Washington Limited Liability  
Company;

Defendants.

No. 2:20-cv-00233-SMJ

**ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Defendants' Motion for Summary Judgment, ECF No 43. After hearing oral argument on the motion and reviewing the file, the Court is fully informed and finds that Defendants have not met their burden of demonstrating that there are no genuine disputes of material fact. As such, the Court denies the motion for summary judgment.

**BACKGROUND**

Defendant Live Nation, via a long-term lease, owns and operates the music performance facility known as "The Gorge" in George, Washington. ECF No. 56-14 at 3. Live Nation contracted with Defendant Conscious Entertainment Group ("CEG") to put on the 2017 Paradiso Festival, an electronic dance music festival.

1 ECF No. 56-15. The festival had multiple stages on which to perform. ECF No. 56-  
2 11 at 4. The stage at issue here, which was not the main stage, was known as the  
3 “Wreckage” stage, as it was built to resemble the crash-landing site of a small plane  
4 in a tropical jungle. *Id.*; ECF No. 56-5 at 1.

5 Defendant CEG was the lead event producer for the 2017 Paradiso Festival  
6 and was tasked with, among other things, hiring talent and managing production  
7 design. ECF No. 56-15 at 2. The stage was designed by Chad Craig, dba A Way of  
8 Life Productions, dba AWOL Productions, with CEG having final design approval  
9 before sending the designs to its engineering firm, Clark Reder. *Id.* at 3; ECF No.  
10 56-9 at 6. For its part, Live Nation hired engineer Karl Sutter of Kimley-Horn to  
11 evaluate the stages before the event began. ECF No. 56-14 at 6.

12 Although the initial stage design was designed for stationary musical  
13 performances, a different design was ultimately approved with additional staging to  
14 be built off the front of the stage—a feature known as an “ego thrust.” *Id.* at 9.  
15 Defendants argue that the extra feature was added at the request of Plaintiff’s  
16 musical group, Keys N Krates, but Plaintiff disputes this.<sup>1</sup> See ECF No. 57 at 2.  
17 Regardless, this request created a gap in the stage, to the side of the ego thrust. *Id.*  
18 According to the stage’s designer, CEG later asked the for a flat stage design,

19 \_\_\_\_\_  
20 <sup>1</sup> Plaintiff is the sound engineer and tour manager for the group. He was also often  
the production manager, but not for the 2017 Paradiso Festival. See ECF No. 57 at  
3.

1 because Keys N Krates was going to give a “live” performance, as opposed to, the  
2 more typical stationary DJ performance. *Id.* at 10. The stage designer ultimately  
3 produced the requested flat stage design, which did not have the “gap” into which  
4 Plaintiff eventually fell, ECF No. 56-4 at 4, but the final plans stamped by  
5 engineering firm Clark Reder and built at the 2017 Paradiso Festival used the older  
6 design, which had the gap, *id.* at 7.

7 Plaintiff Jackson stood on the stage the day before his injury and on the day  
8 of his injury, as late as 2:30 in the afternoon. At the time, he “was aware of many,  
9 many gaps and/or missing sections of 4-by-8 or 8-by-8 stage on the stage that day  
10 leading up to [the performance].” ECF No. 38 at 29. He “believe[s]” that the gap he  
11 ultimately fell in was there at 2:30 in the afternoon. He also acknowledges that  
12 “every time you get on a stage there is a risk.” ECF No. 38 at 24. He has seen a  
13 dozen incidents that he can “vividly remember or my memory could be jogged for”  
14 of people falling off a stage. *Id.* at 24–25. “From the moment we arrive I knew that  
15 there were areas that were either askew, elevated, missing, yes.” *id.* at 26. He knew  
16 that these areas “absolutely could” pose a potential danger and was worried about  
17 them. *Id.*

18 In Jackson’s declaration, attached to his response, he clarifies:

19 Since I had complained to multiple people during the sound check  
20 seven hours earlier about the missing stage deck pieces, and that those  
were safety concerns that needed to be fixed, and the fact that I had  
been told that more stage decking was coming, I assumed that the gaps

had been filled with stage decking prior to falling into the hole. I was worried and concerned about the various gaps on the stage that I saw during the sound check, but assumed that they had been fixed prior to Keys N Krates performance starting.

ECF No. 57 at 2.

Plaintiff Jackson, who worked hundreds of shows with Keys N Krates, stationed himself, crouched down with his iPad, far stage right to serve as sound engineer for Keys N Krates' 10:00 P.M. show. *See* ECF No. 57 at 2. At some point, while holding the iPad in his left hand, he took a video with this phone. Around 10:30 P.M., the band's drummer signals to Plaintiff that something is wrong. Plaintiff then locked the tablet and runs—not sprinting, but “crouched a bit lower and running towards the drummer,” “looking him in the eye.” ECF No. 38 at 28. As he’s running, he falls into the gap, suffering injury. He sued in negligence, seeking monetary damages. Now, Defendants Live Nation and CEG move for summary judgment on three grounds. *See* ECF No. 43 at 2–3. Defendants Live Nation and CEG, in their reply, also moved for an adverse inference due to spoliation and to strike Plaintiff Jackson’s declaration. ECF No. 86.

## LEGAL STANDARD

## A. Summary Judgment

Courts must “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if it could affect the suit’s

1 outcome under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
2 248 (1986). An issue is “genuine” if a reasonable jury could find for the nonmoving  
3 party based on the undisputed evidence. *Id.* The moving party bears the “burden of  
4 establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v. Catrett*, 477  
5 U.S. 317, 330 (1986). “This burden has two distinct components: an initial burden  
6 of production, which shifts to the nonmoving party if satisfied by the moving party;  
7 and an ultimate burden of persuasion, which always remains on the moving party.”

8 *Id.*

9 **B. Washington Negligence and Premises Liability**

10 To establish negligence, a plaintiff must prove four basic elements: (1) the  
11 existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate  
12 cause. *Musci v. Graoch Associates Ltd. P'ship No. 12*, 31 P.3d 684, 854 (Wash.  
13 2001). Whether a duty exists is a question of law. *Hutchins v. 1001 Fourth Ave.*  
14 *Assocs.*, 802 P.2d 1360, 1362 (Wash. 1991).

15 In premises liability actions, a person’s status, based on the common law  
16 classifications of persons entering upon real property—invitee, licensee, or  
17 trespasser—determines the scope of the duty of care owed by the possessor of that  
18 property. *Van Dinter v. Kennewick*, 846 P.2d 522, 524 (Wash. 1993); *see generally*  
19 W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* §§ 58–61  
20 (5th ed. 1984) (hereafter *Prosser & Keeton on Torts*).

1 A “business invitee” is a person who is “invited to enter or remain on land  
2 for a purpose directly or indirectly connected with business dealings with the  
3 possessor of the land.” *Younce v. Ferguson*, 724 P.2d 991, 996 (Wash. 1986)  
4 (quoting Restatement (Second) Of Torts § 332(3) (1965)). An invitation can be  
5 either express or implied permission gathered from the words or conduct of the  
6 landowner. *Afoa v. Port of Seattle*, 296 P.3d 800 (Wash. 2013) (citing Restatement  
7 (Second) Of Torts § 332 cmt. c.).

8 In contrast to what a licensee may expect, an invitee “is . . . entitled to expect  
9 that the possessor will exercise reasonable care to make the land safe for his [or her]  
10 entry.” Restatement (Second) of Torts § 343, comment b. Reasonable care requires  
11 the landowner to inspect for dangerous conditions, “followed by such repair,  
12 safeguards, or warning as may be reasonably necessary for [the invitee’s] protection  
13 under the circumstances.” Restatement (Second) of Torts § 343, comment b.

14 Under Restatement (Second) of Torts § 343A,

15 “(1) A possessor of land is not liable to . . . invitees for physical harm  
16 caused to them by any activity or condition on the land whose danger  
17 is known or obvious to them, unless the possessor “should anticipate  
18 the harm despite such knowledge or obviousness.”

19 Restatement (Second) of Torts § 343A(1). At the same time, the Washington  
20 Supreme Court has endorsed comment f:

21 [R]eason to expect harm to the visitor from known or obvious dangers  
22 may arise, for example, where the possessor has reason to expect that  
23 the invitee’s attention may be *distracted*, so that he [or she] will not

1 discover what is obvious, or *will forget* what he [or she] has discovered,  
2 or fail to protect . . . against it. Such reason may also arise where the  
3 possessor has reason to expect that the invitee will proceed to encounter  
the known or obvious danger because to a reasonable [person] in [that]  
position the *advantages* of doing so would *outweigh the apparent risk*.

4 Restatement (Second) of Torts § 343A, comment f (1965) (emphasis in *Ticani v.*  
5 *Inland Empire Zoological Soc.*, 875 P.2d 621, 631 (Wash. 1994)). “Distraction,”  
6 the Court continued, “forgetfulness, or foreseeable, reasonable advantages from  
7 encountering the danger are factors which trigger the landowner’s responsibility to  
8 warn of, or make safe, a known or obvious danger.” *Ticani*, 875 P.3d at 631.

9 The Restatement (Second) of Torts § 330 (1965) defines a licensee as “a  
10 person who is privileged to enter or remain on land only by virtue of the possessor’s  
11 consent.” *Younce*, 724 P.2d at 996. In *Memel v. Reimer*, 538 P.2d 517 (Wash.  
12 1975), the Court adopted the Restatement (Second) of Torts § 342 to define a  
13 landowner’s responsibility to licensees for dangerous conditions on the land. That  
14 section provides:

15 A possessor of land is subject to liability for physical harm caused to  
16 licensees by a condition on the land if, but only if,

17 (a) the possessor knows or has reason to know of the condition and  
18 should realize that it involves an unreasonable risk of harm to such  
licensees, and should expect that they will not discover or realize the  
danger, and

19 (b) he [or she] fails to exercise reasonable care to make the condition  
20 safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition  
and the risk involved.

1 Restatement (Second) of Torts § 342 (1965), as quoted in *Younce*, 724 P.2d at 996.

2 The duties in Restatement (Second) of Torts § 342 turn on the respective  
3 knowledge of the landowner and licensee. “First, the landowner must know, or have  
4 reason to know, about a hidden danger created by a natural condition.” *Ticani*, 875  
5 P.2d at 628. In *Memel*, the Washington Supreme Court described the extent of the  
6 duty arising from this knowledge:

7 We are not requiring that the occupier either prepare a safe place, or  
8 that he [or she] affirmatively seek out and discover hidden dangers.  
9 What we do impose is a duty to exercise reasonable care where there is  
10 a known dangerous condition on the property and the occupier can  
11 reasonably anticipate that [the] licensee will not discover or realize the  
12 risks. Under these circumstances, the landowner can fulfill his [or her]  
13 duty by either making the condition safe or by warning [the] licensee  
14 of the condition and its inherent risks.

15 *Memel*, 538 P.2d 517. “Second, the licensee must not know, or have reason to know,  
16 about the dangers presented by a natural condition.” *Ticani*, 875 P.2d at 628. “A  
17 licensee’s full understanding that a natural condition is dangerous ends any liability  
18 of the landowner for the condition.” *Id.*

19 [E]ven though a dangerous condition is concealed and not obvious, and  
20 the possessor has given the licensee no warning, if the licensee is in fact  
fully aware of the condition and the risk, there is no liability to him [or  
her].

21 *Id.* (quoting Restatement (Second) of Torts § 342, comment l).

22 //

23 //

## DISCUSSION

As an initial matter, the Court takes up Defendants' motions to strike and for an adverse inference, ECF No. 86 at 15–20. Finding neither meritorious, the Court then turns to Defendants' motion for summary judgment, ECF No. 43.

### A. Motion to Strike Declaration

First, Defendants ask the Court to strike Plaintiff's Declaration as a sham affidavit that "flatly contradict[s]" Plaintiff's deposition testimony. ECF No. 86 at 19 (citing *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009)). Specifically, Defendants take issue with Plaintiff's declaration that "I assumed that the opening had been fixed prior to falling into the hole, and I was unaware it existed prior to falling in at the moment right before I fell in." ECF No. 87 at 19 (quoting ECF No. 57 at 2). This, Defendants argue, is flatly contradicted by Plaintiff's deposition testimony and his submitted video evidence. The Court disagrees. Instead, at his deposition, Plaintiff repeatedly acknowledged that he visited the Wreckage stage on the day of the performance and knew of uneven staging and gaps but avoided acknowledging that he knew the particular gap at issue was present at the time of the performance. *See* ECF No. 45-1 at 18 ("Sir, as I've mentioned many other times, there were numerous 4-by-8 and 8-by-8 missing sections in that stage [when he visited the stage earlier in the day]. So, yes, was it in the exact state that it was when I was on the stage earlier? I don't know. Was it there? Yes, I'm

1 sure it was there as part of those other gaps.”). Moreover, although the referenced  
2 video, taken by Plaintiff, shows the gap, the video does not conclusively establish  
3 that Plaintiff saw and acknowledged the gap. *See also* ECF No. 57 at 2 (“During  
4 Keys N Krates’ performance, my attention was focused on my iPad in my left hand  
5 because I was controlling the sound levels. I briefly scanned the crowd with my  
6 iPhone in my right hand to document the crowd reactions for Keys N Krates’ social  
7 media. I do not recall observing the gap in the stage when I took the video.”). The  
8 Court does not find that the Declaration is flatly contradicted by either Plaintiff’s  
9 deposition or the submitted video. Accordingly, the motion to strike the declaration  
10 is denied, though the Court notes that the Declaration is not dispositive to its  
11 resolution of the motion for summary judgment.

12 **B. Motion to Strike Deposition Testimony**

13 Second, Defendants Live Nation and CEG are troubled that Plaintiff’s  
14 counsel stated on the record that he was representing fact witnesses for purposes of  
15 their depositions and therefore claimed privilege at the depositions when those  
16 witnesses were asked about conversations with counsel. ECF No. 86 at 15–18. In  
17 his supplemental briefing on that issue, Plaintiff’s counsel explains that although he  
18 did not seek written consent from these fact witnesses, he did not consider written  
19 consent necessary under RPC 1.7 given that his representation would not be  
20 materially limited as a result of his duties to each of the other clients. ECF No. 103.

1 After review of counsel's declaration, in which he notes that the fact witnesses had  
2 no adverse interest against Plaintiff and all had similar evidence, the Court is  
3 satisfied that counsel did not run afoul of his ethical duties, though best practice in  
4 the future would be for counsel to confirm in writing that he has explained to each  
5 of his clients even the more remote possibilities that his representation may be  
6 limited by a conflict of interest. Regardless, the remedies Defendant's seek—  
7 exclusion or further discovery—are either heavy handed or else would infringe on  
8 the *clients'* interests in keeping their privileged communications secret. The motion  
9 to strike is denied.

10 **C. Motion for Adverse Inference**

11 Next, Defendants Live Nation and CEG urge the Court to take an adverse  
12 inference regarding purportedly spoliated materials. ECF No. 86 at 12–15.  
13 Specifically, Defendants argue that although Plaintiff's counsel provided an  
14 electronic download all the photographs and videos Mary Mahan (Plaintiff's  
15 fiancée) took that day, the sequential numbering of those files reveals that certain  
16 photos and videos had been deleted. *Id.* Ms. Mahan's explanation is that she  
17 "contemporaneously" deleted these photos. *See* ECF No. 86. In other words, she  
18 would take a handful of photos and videos, would look at them, and delete those  
19 she found redundant or unappealing. The Court finds this to a reasonable  
20 explanation, and Defendants have provided no persuasive evidence to put the

1 explanation in doubt. As such, at least some of the photos and videos may have been  
2 deleted before any duty to preserve was triggered. *Suroqiec v. Capital Title Agency,*  
3 *Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011) (“[T]he duty to preserve arises when  
4 a party knows or should know that certain evidence is relevant to pending or future  
5 litigation.”). As for the others, even if Ms. Mahan anticipated future litigation, this  
6 does not obviate the fact that she may have deleted duplicates, blurry images, and  
7 the like. As such, the Court denies the request to take an adverse inference that the  
8 missing files would be beneficial to Defendants.

9 **D. Summary Judgment**

10 The Court begins its analysis of the summary judgment motion by  
11 determining Plaintiff’s status at the 2017 Paradiso Festival. Here, construing the  
12 available evidence in Plaintiff’s favor, the Court determines that Plaintiff is a  
13 business invitee, as he was there for a business purpose that benefited the possessor  
14 of the area. Such a finding is in line with Washington’s business invitee cases, such  
15 as *Afoa v. Port of Seattle*, 296 P.3d 800 (Wash. 2013). In *Afoa*, the Washington  
16 Supreme Court reviewed, at the summary judgment stage, the claims of an airline  
17 employee working at Sea-Tac Airport. There, he operated a “tug” or “pushback,”  
18 the powered industrial vehicle that pushes the airplanes back from the passenger  
19 gates. Even though Afoa had no direct employer-employee relationship with the Port  
20 of Seattle/Sea-Tac, the Washington Supreme Court explained that:

1 Afoa was plainly a business invitee because he was on the premises for  
2 a purpose connected to business dealings with the Port. There is simply  
3 no genuine dispute in the record on this point. The Port is in the  
4 business of running an airport, and Afoa was doing airport work.  
Indeed, he was doing work (loading and unloading airplanes) without  
5 which Sea-Tac Airport could not operate. Afoa was unquestionably on  
the premises for a purpose connected to business, so he is a business  
invitee. On this record, no reasonable jury could find otherwise.

6 *Afoa*, 296 P.3d at 468.

7 Given this, the possessor of the land owes a duty to exercise reasonable care  
8 to protect Plaintiff from unreasonable risk of harm, subject to the elements set out  
9 in Sections 343 and 343A of the Restatement. The Court thus turns to who was a  
10 possessor of the land.

11 Washington courts have defined the “possessor of land” as “a person who is  
12 in occupation of land with intent to control it.” *Jarr v. Seeco Const. Co.*, 666 P.2d  
13 392, 394 (Wash. App. 1983) (quoting Restatement (Second) of Torts § 328E)  
14 (emphasis added); *see also Adamson v. Port of Bellingham*, 438 P.3d 1195 (2016).  
15 Here, Defendants were owned and occupiers the land, and they each demonstrated  
16 an intent to control the land, using and changing it with the intent of putting on the  
17 2017 Paradiso Festival at which Plaintiff was injured. As such, Defendants are not  
18 entitled to summary judgment on this point.

19 Even so, Defendants argue, Plaintiff is barred by assumption of the risk. ECF  
20 No. 43 at 5–15. Washington law recognizes four categories of assumption of risk:  
(1) express, (2) implied primary, (3) implied reasonable, and (4) implied

1 unreasonable. *Erie v. White*, 966 P.2d 342, 344 (Wash. App. 1998). The last two  
2 are “nothing but alternative names for contributory negligence.” *Home v. N. Kitsap*  
3 *Sch. Dist.*, 965 P.2d 1112, 1118 (Wash. App. 1998). To find implied primary  
4 assumption of the risk, “[t]he evidence must show the plaintiff (1) had full  
5 subjective understanding (2) of the presence and nature of the specific risk, and (3)  
6 voluntarily chose to encounter the risk.” *Hvolboll v. Wolff Co.*, 347 P.3d 476, 481–  
7 82 (Wash App. 2015) (quoting *Kirk v. Washington State University*, 746 P.2d 285,  
8 288 (1987)).

9       But Plaintiff persuasively argues against application of implied assumption  
10 of the risk. First, as Plaintiff notes in his briefing, it is necessary to distinguish  
11 between implied primary assumption of risk and implied unreasonable (or implied  
12 reasonable) assumption of risk. While the former may operate as a complete bar to  
13 recovery, the latter is often a question best left for the jury to consider in weighing  
14 comparative negligence. *See Gleason v. Cohen*, 368 P.3d 531, 535 (Wash. App.  
15 2016).

16       Trial courts are rightfully wary of requests to instruct the jury on  
17 implied primary assumption of the risk. That doctrine, if not boxed in  
18 and carefully watched, has an expansive tendency to reintroduce the  
complete bar to recovery into territory now staked out by statute as the  
domain of comparative negligence.

19       *Id.* (quoting *Dorr v. Big Creek Wood Prods., Inc.*, 927 P.2d 1148 (Wash. App.  
20 1996); *see also Kirk v. Washington State Univ.*, 746 P.2d 285, 287 (1987)).

1       Second, to qualify for implied primary assumption of risk, the risk assumed  
2 by plaintiff must have been inherent to the activity. *Gleason*, 368 P.3d at 534. If the  
3 risk was negligently created by the defendant and the plaintiff knowingly chooses  
4 to proceed regardless, he has at most engaged in implied unreasonable assumption  
5 of risk, and his claim is not barred.

6       [I]mplied reasonable and unreasonable assumption of risk arise where  
7 the plaintiff is aware of a risk that already has been created by the  
8 negligence of the defendant, yet chooses voluntarily to encounter it. In  
9 such a case, plaintiff's conduct is not truly consensual, but is a form of  
contributory negligence, in which the negligence consists of making  
the wrong choice and voluntarily encountering a known unreasonable  
risk.

10       *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 14 (1992).

11       In *Gleason*, for example, the plaintiff hired the defendant to help remove  
12 some trees from his property. 386 P.3d at 533. The plaintiff told the defendant that  
13 he had improperly placed a choke chain on the tree to be removed, and that doing  
14 so was unsafe for additional other reasons, but plaintiff proceeded to assist with the  
15 tree removal anyway. *Id.* at 533–34. The tree fell on him. In overturning the trial  
16 court's finding of implied primary assumption of risk, the court said that while the  
17 possibility of a tree falling on someone is an inherent risk of tree removal, “whether  
18 implied primary assumption of risk applies does not depend on whether the plaintiff  
19 has voluntarily encountered a known risk. It depends on whether the risk the  
20 plaintiff encountered was inherent in the activity in which the plaintiff was engaged.

1 And implied primary assumption of risk does not apply when the plaintiff has  
2 knowingly encountered an additional risk that the defendant has created.” *Id.* at 300.  
3 Even so, “[i]mplied primary assumption of risk occupies a very ‘narrow niche. In  
4 most situations, a plaintiff who has voluntarily encountered a known specific risk  
5 has, at worst, merely failed to use ordinary care for his or her own safety, and an  
6 instruction on contributory negligence is all that is necessary and appropriate.’ *Id.*  
7 at 536 (quoting *Dorr*, 927 P.3d at 426).

8 To illustrate, in *Scott*, the plaintiff was injured while skiing a “slalom race  
9 course which had been laid out by the ski school owner, allegedly according to  
10 instructions from an agent of the ski resort.” *Scott*, 834 P.2d at 8 (1992). He hit a  
11 shed that was located too closely to the course. *Id.* In overturning a grant of  
12 summary judgment for both the resort and the ski school, the court held that “while  
13 participants in sports are generally held to have impliedly assumed the risks inherent  
14 in the sport, such assumption of risk does not preclude a recovery for negligent acts  
15 which unduly enhance such risks.” *Id.* at 15 (1992).

16 Here, the Court cannot find based on the evidence presented that falling into  
17 this gap—with its precise dimensions, narrow walkway, and lack of reflective  
18 tape—is so inherent to that activity of working as a band’s sound engineer at a  
19 festival. Moreover, Plaintiff, argues that he had reason to believe the gap would be  
20 gone. *See* ECF No. 57 (“Since I had complained to multiple people during the sound

1 check seven hours earlier about the missing stage deck pieces, and that those were  
2 safety concerns that needed to be fixed, and the fact that I had been told that more  
3 stage decking was coming, I assumed that the gaps had been filled with stage  
4 decking prior to falling into the hole.”). Whether or not Plaintiff honestly believed  
5 that the gap would be gone requires the Court to make a credibility finding that is  
6 prohibited at the summary judgment stage.

7 Nor, for that matter, can the Court determine as a matter of law that Plaintiff  
8 was contributorily negligent. “In determining a plaintiff’s contributory negligence,  
9 ‘the inquiry is whether or not he exercised that reasonable care for his own safety  
10 which a reasonable man would have used under the existing facts and  
11 circumstances, and, if not, was his conduct a legally contributing cause of his  
12 injury.’” *Dunnington v. Virginia Mason Med. Ctr.*, 389 P.3d 498, 503 (Wash. 2017)  
13 (quoting *Rosendahl v. Lesourd Methodist Church*, 412 P.2d 109 (Wash. 1966).  
14 “Whether there has been negligence or comparative negligence is a jury question  
15 unless the facts are such that all reasonable persons must draw the same conclusion  
16 from them, in which event the question is one of law for the courts.” *Id.* (quoting  
17 *Hough v. Ballard*, 31 P.3d 6 (2001)). The Court does not find that Defendants have  
18 met that high bar, and it makes little sense for the Court to substitute for the jury on  
19 the question of *whether* Plaintiff was contributorily negligent but then submit the  
20 question of *degree* to the jury.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendants' motions to strike and for an adverse inference, **ECF No.**  
3 **86 at 15–20**, are **DENIED**.

4 2. Defendants' Motion for Summary Judgment, **ECF No. 43**, is  
5 **DENIED**.

6 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
7 provide copies to all counsel.

8 **DATED** this 22<sup>nd</sup> day of August 2022.

9 

10 

---

11 SALVADOR MENDOZA, JR.  
12 United States District Judge  
13  
14  
15  
16  
17  
18  
19  
20